APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

NOVEMBER TERM, 1966

BROTHERHOOD OF RAILROAD TRAINMEN; A. J. CROSBY; J. W. CROCKER; J. C. DAVIS; F. A. MERRITT; R. P. PARSONS; A. SUBRY; T. A. SPRINGER; and B. L. TRUE,
Appellants,
v.
DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY,
Appellee.
No. 8278

DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY,
Cross-Appellant,
v.
BROTHERHOOD OF RAILROAD TRAINMEN; A. J. CROSBY; J. W. CROCKER; J. C. DAVIS; F. A. MERRITT; R. P. PARSONS; A. SUBRY; T. A. SPRINGER; and B. L. TRUE,
Cross-Appellees.
No. 8279

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

James L. Highsaw, Jr. (Philip Hornbein, Jr., Hornbein & Hornbein and Mulholland, Hickey & Lyman, of counsel,

were with him on the brief) for Appellants and Cross-Appellees.

Martin Lucente (Ernest Porter, Kenneth D. Barrows, Walter J. Cummings, Jr., Richard H. Compere and Sidley, Austin, Burgess & Smith, of counsel, on the brief) for Appellee and Cross-Appellant.

Before MURRAH, Chief Judge, and PICKETT and LEWIS, Circuit Judges.

LEWIS, Circuit Judge.

On January 15, 1962 appellants filed in the District Court for the District of Colorado a petition under section 3 First (p) of the Railway Labor Act, 45 U.S.C. § 153 First (p), seeking enforcement of an order of the National Railroad Adjustment Board, First Division. The Board order had granted the sum of $472,000 to the individual appellants, employees of the appellee railroad and members of the appellant Brotherhood, as an award compensating the claimants for services required by the railroad in violation of their collective bargaining agreement. The contract controversy involved the "herding" of locomotives and the award constituted a full day's pay for each claim filed. By its judgment, the district court held that substantial evidence supported the Board's determination that the railroad had violated the terms of its collective bargaining agreement but that the Board had incorrectly determined the proper measure of the allowable award. The district court allowed judgment for nominal damages in the amount of one dollar per day rather than a full day's pay for each incident of contract violation. By appeal and cross appeal the parties assert error in that portion of the judgment that is adverse to their respective interests.

At the time judgment was entered in the district court jurisdiction existed for each facet of the judgment including the reassessment of the amount of the award. 45 U.S.C. § 153 First (m); Gunther v. San Diego & A. E. Ry., 382 U.S. 257. And the case was first submitted to this court in such posture of the governing law. However, on June 20, 1966 the Railway Labor Act was amended by Public Law 89-456, 80 Stat. 208, which provided for severe restraints on the scope of judicial review of awards of the Railroad Adjustment Board.[1]

Prior to the 1966 amendment, section 3 First (m) of the Railway Labor Act read in pertinent part:

> "The awards of the several divisions of the Adjustment Board shall be stated in writing. A copy of the awards shall be furnished to the respective parties to the controversy, and the awards shall be final and binding upon both parties to the dispute, except insofar as they shall contain a money award. . . ."

This provision was amended by section 2(a) of the 1966 Act by deleting the words "except insofar as they shall contain a money award."

Prior to the 1966 amendment, section 3 First (p) of the Railway Labor Act provided that in suits for enforcement of Adjustment Board awards in the district courts of the United States, ". . . the findings and order of the division of the Adjustment Board shall be prima facie evidence of the facts therein stated . . ." This language was changed by the 1966 amendment to read as follows:

> ". . . the findings and order of the division of the Adjustment Board shall be conclusive on the parties . . . ."

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[1] The parties have since filed supplemental briefs.

A new paragraph (q) was added to section 3 First of the Act which gives any aggrieved party the right to petition a district court for review of an Adjustment Board decision and provides that "On such review, the findings and order of the division shall be conclusive on the parties, except that the order of the division may be set aside, in whole or in part, or remanded to the division, for failure of the division to comply with the requirements of this Act, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order. The judgment of the court shall be subject to review as provided in sections 1291 and 1254 of title 28, United States Code."

As we have earlier indicated, this action was pending before us on June 20, 1966, the effective date of Public Law 89-456. It is very clear that the judgment of the district court, regardless of its correctness when entered, must now be given appellate consideration in view of the amendments to the controlling statutes. Carpenter v. Wabash Ry., 309 U.S. 23, 26, 27. See also Hines v. Davidowitz, 312 U.S. 52; American Foundries v. Tri-City Central Trades Council, 257 U.S. 184. And it has specifically been held that the repeal of a law conferring jurisdiction, absent a savings clause for pending cases, destroys jurisdiction in pending cases. Bruner v. United States, 343 U.S. 112. Our case falls squarely within the compulsion of those rules, for with the repeal of the district court's jurisdiction to review money awards the jurisdictional foundation for its judgment as to the amount of the award no longer exists. The judgment in such respect must be set aside, unless, as the appellee railroad contends, the Board order is invalid even within the scope of the amendments or Public Law 89-456 is unconstitutional in inception.

Section 2(d) of Public Law 89-456 provides in part that an order of the Adjustment Board " . . . may not be set aside except for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction . . ." The appellee railroad projects against the amended statute a continuation of two of their original protests to the Board decision and order: refusal of the Board to apply the rule of res judicata or collateral estoppel[2] and the affirmative application of a full day's wage as the measure of damages for each instance of contract violation. We can accord no merit to the claim that, under present limitations on review, the order can or must be set aside. The defenses of res judicata and collateral estoppel are affirmative defenses that, even prior to the amendment, were doubtful subjects of judicial review. See Hodges v. Atlantic Coast Line R. R., 5 Cir., 363 F.2d 534, *interpreting* Gunther v. San Diego & A. E. Ry., 382 U.S. 257. Since review under the cited portion of Public Law 89-456 is now limited "to matters within the scope of the division's jurisdiction," defenses other than jurisdiction defenses are not subject to judicial review by virtue of the specific wording of the statute itself. So, too, the Board's determination of the amount of the award is final absent a jurisdictional defect. The measure of damages, like the application of affirmative defenses, offers no jurisdictional question.

Finally, the railroad contends that Public Law 89-456, by making the findings of the Board conclusive and by refusing review of an order requiring the payment of money damages, is violative of the Seventh Amendment right to trial by jury. We can place no constitutional significance in the statutory amendments as such. The right to a jury in the district court existed before the 1966 amendments and

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[2] An earlier Board decision had upheld the railroad's position concerning the contract duty to "herd" locomotives.

it exists now. The significance of the amendments lies in bounding the already limited scope of judicial review so that the merits of the controversy are in reality a closed question after determination by the Board. Such power in Congress is recognized by the Supreme Court as proper in the field of railway labor law in *Gunther* and reflects the theory that compulsory arbitration of labor disputes must be final, for the "federal policy of settling labor disputes by arbitration would be undermined if courts had the final say on the merits of the awards." United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 596.

Although the Board's consideration of the issues was prior to the effective date of Public Law 89-456, the amendments do not require any further administrative proceedings. *Cf.* Transportation-Communication Employees Union v. Union Pacific R.R., ... U.S. ...., decided December 5, 1966. Accordingly the case is remanded to the district court with instructions to enforce the award.

APPENDIX B

PUBLIC LAW 89-456
89th CONGRESS, H. R. 706
June 20, 1966

AN ACT

To amend the Railway Labor Act in order to provide for establishment of special adjustment boards upon the request either of representatives of employees or of carriers to resolve disputes otherwise referable to the National Railroad Adjustment Board, and to make all awards of such Board final.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That:

Section 3, Second, of the Railway Labor Act is amended by adding at the end thereof the following:

"If written request is made upon any individual carrier by the representative of any craft or class of employees of such carrier for the establishment of a special board of adjustment to resolve disputes otherwise referable to the Adjustment Board, or any dispute which has been pending before the Adjustment Board for twelve months from the date the dispute (claim) is received by the Board, or if any carrier makes such a request upon any such representative, the carrier or the repersentative upon whom such request is made shall join in an agreement establishing such a board within thirty days from the date such request is made. The cases which may be considered by such board shall be defined in the agreement establishing it. Such board shall consist of one person designated by the carrier and one person designated by the representative of the employees. If such carrier or such representative fails to agree upon the establishment of

such a board as provided herein, or to exercise its rights to designate a member of the board, the carrier or representative making the request for the establishment of the special board may request the Mediation Board to designate a member of the special board on behalf of the carrier or representative upon whom such request was made. Upon receipt of a request for such designation the Mediation Board shall promptly make such designation and shall select an individual associated in interest with the carrier or representative he is to represent, who, with the member appointed by the carrier or representative requesting the establishment of the special board, shall constitute the board. Each member of the board shall be compensated by the party he is to represent. The members of the board so designated shall determine all matters not previously agreed upon by the carrier and the representative of the employees with respect to the establishment and jurisdiction of the board. If they are unable to agree such matters shall be determined by a neutral member of the board selected or appointed and compensated in the same manner as is hereinafter provided with respect to situations where the members of the board are unable to agree upon an award. Such neutral member shall cease to be a member of the board when he has determined such matters. If with respect to any dispute or group of disputes the members of the board designated by the carrier and the representative are unable to agree upon an award disposing of the dispute or group of disputes they shall by mutual agreement select a neutral person to be a member of the board for the consideration and disposition of such dispute or group of disputes. In the event the members of the board designated by the parties are unable, within ten days after their failure to agree upon an award, to agree upon the selection of such neutral person, either member of the board may request the Mediation Board to appoint such neutral person and upon receipt of such request the Mediation Board shall promptly make such appointment. The neutral person so selected or ap-

pointed shall be compensated and reimbursed for expenses by the Mediation Board. Any ~~two~~ members of the board shall be competent to render an award. Such awards shall be final and binding upon both parties to the dispute and if in favor of the petititoner, shall direct the other party to comply therewith on or before the day named. Compliance with such awards shall be enforceable by proceedings in the United States district courts in the same manner and subject to the same provisions that apply to proceedings for enforcement of compliance with awards of the Adjustment Board."

SEC. 2. (a) The second sentence of section 3, First, (m), of the Railway Labor Act is amended by striking out, "except insofar as they shall contain a money award."

(b) Section 3, First, (o), of the Railway Labor Act is amended by adding at the end thereof the following new sentence: "In the event any division determines that an award favorable to the petitioner should not be made in any dispute referred to it, the division shall make an order to the petitioner stating such determination."

(c) The second sentence of section 3, First, (p), of such Act is amended by striking out "shall be prima facie evidence of the facts therein stated" and inserting in lieu thereof "shall be conclusive on the parties."

(d) The last sentence of section 3, First, (p), of such Act is amended by inserting before the period at the end thereof the following: ": *Provided, however,* That such order may not be set aside except for failure of the division to comply with the requirements of this Act, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order."

(e) Section 3, First, of such Act is further amended by redesignating paragraphs (q) through (w) thereof as paragraphs (r) through (x), respectively, and by

inserting after paragraph (p) the following new paragraph:

"(q) If any employee or group of employees, or any carrier, is aggrieved by the failure of any division of the Adjustment Board to make an award in a dispute referred to it, or is aggrieved by any of the terms of an award or by the failure of the division to include certain terms in such award, then such employee or group of employees or carrier may file in any United States district court in which a petition under paragraph (p) could be filed, a petition for review of the division's order. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Adjustment Board. The Adjustment Board shall file in the court the record of the proceedings on which it based its action. The court shall have jurisdiction to affirm the order of the division or to set it aside, in whole or in part, or it may remand the proceeding to the division for such further action as it may direct. On such review, the findings and order of the division shall be conclusive on the parties, except that the order of the division may be set aside, in whole or in part, or remanded to the division, for failure of the division to comply with the requirements of this Act, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order. The judgment of the court shall be subject to review as provided in sections 1291 and 1254 of title 28, United States Code."

APPROVED JUNE 20, 1966.

RAILWAY LABOR ACT

(45 U.S.C.A. §§ 153 First (m) and (p) prior to 1966 amendments)

§ *3 First (m)* The awards of the several divisions of the Adjustment Board shall be stated in writing. A copy of

the awards shall be furnished to the respective parties to the controversy, and the awards shall be final and binding upon both parties to the dispute, except insofar as they shall contain a money award. In case a dispute arises involving an interpretation of the award, the division of the Board upon request of either party shall interpret the award in the light of the dispute.

* * *

§ *3 First (p)* If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the carrier operates, a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Adjustment Board in the premises. Such suit in the District Court of the United States shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of the division of the Adjustment Board shall be prima facie evidence of the facts therein stated, and except that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings, unless they accrue upon his appeal, and such costs shall be paid out of the appropriation for the expenses of the courts of the United States. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. The district courts are empowered, under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board.

Seventh Amendment to the Constitution of The United States

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.